see *Den* v. *Bordine*, 20 N. J. Law 394. Neither can he bring an action for damages to realty held in trust. *Davis* v. *Charles River Co.*, 11 Cush. (Mass.) 506. Where a plaintiff held real estate under a contract of purchase, on which all payments had been made, so as to entitle him to a deed, in an action for damages to the land, the court, though recognizing the necessity of joining the legal owner, allowed the *cestui* to recover on the ground that the defendant had failed to object at the proper time. *F., E. & M. V. R. Co.* v. *Setright*, 34 Neb. 253. But the principal case, which is not rested by the court on any statute, seems to go farther than any other. It disregards the true nature of the trust relation in suggesting that the rights of the *cestui* are here analogous to those of a lessee.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY OF TRUSTEE ACTING UNDER ADVICE OF COUNSEL. — A joint stock company acting as trustee paid under legal advice part of the trust funds to the wrong parties. *Held*, that the trustee is personally liable. *National Trustees, etc., Co.* v. *General Finance, etc., Co.*, 54 W. R. 1 (Eng., Privy Council, May 16, 1905).

A trustee must use such care in the management of the trust fund as men of ordinary prudence use in their own affairs. That a trustee has taken the advice of counsel is strong evidence of such prudence. *Neff's Appeal*, 57 Pa. St. 91. But in the distribution of the trust estate, a stricter liability is enforced. Where a trustee makes a payment to a person not authorized, he is liable personally for the misapplication; and this liability will follow, even though he acted in good faith and under the advice of counsel. *Doyle* v. *Blake*, 2 Sch. & Lef. 231, 243; *Owings* v. *Rhodes*, 65 Md. 408. In the latter event, however, it seems that the court will not impose costs on the trustee. *Angier* v. *Stannard*, 3 Myl. & K. 566. Where payment should be made according to the law of a foreign country, a trustee is not liable for a mistake as to that law unless the provision is called to his notice. *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91. The apparent stringency of the general rule is relieved by the fact that a trustee may, in case of doubt, refuse to distribute the trust fund without the sanction of the court. *Re Wylly's Trusts*, 28 Beav. 458.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: RIPARIAN RIGHTS — EXTINGUISHMENT OF RIPARIAN RIGHTS. — *Semble*, that a transfer of a right to water in a stream is a transfer of real property within the Statute of Frauds, but such transfer, though by parol, is excepted from the statute by equity when there has been part performance under an agreement to give a license to divert. *Churchill* v. *Russell*, 82 Pac. Rep. 440 (Cal.). See NOTES, p. 293.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE RELATION OF CUSTOM TO LAW. — The retrospective operation of judicial decisions in affecting rights which have accrued prior to their adoption has been explained by various theories. The early English judges, holding themselves incompetent to add to the common law, decided new questions of law that arose concerning past transactions, under the pretense of following precedents which did not in fact exist. In modern times judges have explained this effect of their decisions by the doctrine that judges do not make the law, but merely interpret a body of rules already existing independently of their decision. Upon either of these assumptions the court merely applies a pre-existing rule, however novel the question presented for its judgment. This retrospective effect of a decision and the theories by which it is sought to be explained furnish plausible grounds for the doctrine that customs which have

become embodied in the common law were law before they were adopted by the courts. In a recent article concerning the judicial enforcement of custom the notion that judges are incompetent to add to the law is condemned as a fiction. *Customary Law in Modern England*, by W. Jethro Brown, 5 Columbia L. Rev. 561 (Dec., 1905).

The writer's discussion deals with two questions: at what stage does custom become law, and from what source does it derive its binding force? Custom, the author maintains, amounts only to "a highly persuasive, rather than a legally binding, source of rules." A given custom does not become a rule of law until it has been adopted by judicial decision, and the courts are bound to enforce it. Support for these contentions is sought in "the fact that courts never enforce custom as such, but only enforce custom as satisfying certain tests which the courts themselves have imposed." Particular customs, in order to be enforced, must be reasonable, certain, and immemorial; and even general customs must be reasonable in order to receive the judicial sanction which makes them law. The writer draws a distinction between the conditions under which customs and precedents are given effect by the courts. A precedent binds "unless obviously unreasonable, whilst a custom must be proved positively to be reasonable and in accord with public convenience." The second question as to the source of the binding force of custom is answered by saying that judges are bound to adopt a custom which satisfies the required tests, "not by virtue of any inherent authority of custom, but by virtue of their own practice." The reason why a custom satisfying these tests is law, is simply because "the judges treat it as such," when they sanction it by a decision.

The writer's discussion raises fundamental questions as to the nature of law which divide the historical and analytical schools of jurisprudence. According to the doctrines of the former school, not only is custom law, before it receives any judicial sanction, but it possesses a binding force independently of enforcement by courts and by an inherent and ultimate authority of its own. The analytical jurists, while agreeing that custom derives its authority as law from the sanction of the courts, disagree as to the precise period when custom satisfies the requirements of the definition of law. According to Austin a custom is transmuted into law only when it is adopted as such by a court of justice and the decision is enforced by the power of the state. AUSTIN, JURISPRUDENCE, 4th ed., 104. Holland, however, lays it down that a custom becomes law as soon as it satisfies specified tests, though it has not yet been adopted in any judicial decision; a custom, when it fulfils these requirements, is law by virtue of a "tacit law of the state giving to such customs the effect of laws." HOLLAND, JURISPRUDENCE, 9th ed, 59. The language of Holland's statement seems to involve an argument in a circle. Mr. Brown's view that custom derives its authority from the practice of courts in enforcing it, seems to describe more accurately the facts of our judicial system. And his contention that custom in order to become law must first be sanctioned by judicial decision, is supported by the language of the modern English decisions. See *Brandao* v. *Barnett*, 12 Cl. & F. 787, 805; *Goodwin* v. *Roberts*, L. R. 10 Exch. 346, 352, 357. A similar opinion is expressed in several American decisions. See *Consequa* v. *Willings*, Pet. (U. S. C. C.) 225, 230; *Bonham* v. *Charlotte, etc., R. R. Co.*, 13 S. C. 267, 276.

DISSENTING OPINIONS. — For half a century there has been scattering discussion of the wisdom of dissenting opinions in courts of last resort. No one has attempted to assert that uniform agreement among judges is possible so long as judges are human; the question has been as to the propriety of the publication of their disagreements. The chief arguments against any expression of dissent are its powerlessness to affect the decision of the case, its detraction from the prestige of the impersonal court, and its effect in keeping the law unsettled. The first is probably disposed of by the consideration that the reasons of the court are stated not so much for the benefit of the litigants